

AMW

**United States Court of Appeals
for the Fourth Circuit**

No. 18-1160

BRIAN DAVID HILL

Plaintiff-Appellant

v.

**Executive Office for United States Attorneys (EOUSA)
and United States Department of Justice (U.S. DOJ),
Defendants'-Appellees'**

Appeal from the U.S. District Court

for the Western District of Virginia at Danville

The Honorable Jackson L. Kiser, Senior Judge

4:17-cv-00027

INFORMAL BRIEF OF APPELLANT Brian D. Hill

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U.S. COURT OF APPEALS
FOURTH CIRCUIT

RECEIVED

CORPORATE DISCLOSURE STATEMENT

Pursuant To Federal Rules of Appellate Procedure 26.1,

Plaintiff-Appellant hereby states that no corporation is involved concerning the Appellant of this case.

The Appellant is the sole person with interest in this case,

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JURISDICTION STATEMENT

This case was filed in the district court on 04/25/2017 (JA 1, Doc #1 and #2).

On February 6, 2018, the district court entered an order denying a pro se motion (JA 1, Doc #61), and granting the U.S. Attorney's motion (JA 1, Doc #48) for Summary Judgment.

This appeal is taken from a final decision or order of the district court that deprives the Constitutional due process right of Appellant which involves the Fourteenth Amendment of the United States Constitution concerning a criminal defendant's right to discovery material needed to prove factual innocence, and procedural due process rights. The final decision has closed the case; therefore this appeal is of a final decision.

The district court had jurisdiction to review the Defendants' refusal to disclose records in its possession or has reasonable access to such records in law enforcement custody in response to Brian D. Hill's (Plaintiff's-Appellant's) Freedom of Information Act ("FOIA") Requests pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. The lower court held sua sponte that the FOIA Request dated August 26, 2016 was not a properly filed FOIA request even though it was filed with the same FAX number as the FOIA request dated July 25, 2016. Even though it was faxed two times to the Executive Office for United States Attorneys ("EOUSA") FOIA fax number, the same number that accepted the other FOIA Request is at issue in this case. The lower court also held that the records concerning the (1) North Carolina ("N.C.") State Bureau of Investigation ("SBI") case file of Brian David Hill and (2) [false] confession audio disc containing the

false confession of Brian David Hill, that a copy of those records does not have to be turned over to the Plaintiff-Appellant even as the criminal Defendant of the case of which those records were requested. The records have been requested because his court appointed lawyer refuses to give the records to any other attorney by talking the attorney out of it (citing the Declaration regarding Emily Gladden) (JA 1, Doc #12, Page 4 to 11) and has threatened to destroy the discovery materials to attempt to prevent the Plaintiff-Appellant from proving actual innocence and having his criminal conviction overturned to get off of the Virginia Sex Offender Registry. The court is reasoning with the fact that the records may or may not have been destroyed, but the United States Attorney office still has reasonable access to such records that were used in their prosecution of the Plaintiff-Appellant, therefore the lower court ruled that the Appellees'-Defendants' had sufficiently searched for the records and have released the records fulfilling their obligations under the FOIA because the records at the United States Attorney office may have been destroyed, even though such records can still be accessed by the United States Attorney Office for the Middle District of North Carolina. A letter from the N.C. SBI legal Counsel Angel Gray (JA 1, Doc #2-2, Page 34) was presented during the FOIA Appeal and also filed in this case proving that the N.C. SBI directed the Plaintiff-Appellant to ask for the records from the district attorney or the defense attorney. The defense attorney John Scott Coalter through his actions of talking to Attorney Emily Gladden to turn her against the idea of proving actual innocence, has refused to give the discovery material to a private attorney that desires to prove the innocence of Appellant and has threatened to destroy the discovery material (JA 1, Doc #2-8). So Plaintiff's-Appellant's only option to get a copy of the criminal case discovery materials was to file a FOIA Request, FOIA Appeal, and FOIA lawsuit. The lower court had subject-matter jurisdiction to consider its claim regarding the issue that the SBI forensic report and the confession audio disc

should be turned over to the Plaintiff-Appellant for the purpose of proving factual innocence and is not a jurisdictional limitation in the FOIA.

This Court has jurisdiction to review this appeal pursuant to 28 U.S.C. § 1291.

This appeal is from a final judgment entered by a District Court within the Western District of Virginia on February 6, 2018 disposing of Plaintiff's-Appellant's claims. Brian D. Hill filed a timely notice of appeal on February 8, 2018.

STATEMENT OF THE ISSUES FOR REVIEW

Whether the district court erred in holding that an agency which prosecuted the Plaintiff-Appellant for possession of child pornography has the right to refuse to give the criminal Defendant access to the discovery materials again for the purpose of proving actual innocence?

Whether the district court erred that the Constitutional rights regarding a criminal Defendant pursuant to *Giglio v. United States*, 405 U.S. 150 (1972); *John L. BRADY, Petitioner, v. STATE OF MARYLAND*. No. 490. Argued: March 18 and 19, 1963. Decided: May 13, 1963 does not apply to the Plaintiff-Appellant requesting the criminal case discovery records (originally requested by defense counsel) under two FOIA requests needed to prove actual innocence to succeed in a 2255 motion to vacate, set aside, or modify a sentence by a person in federal custody filed after the (1) one year statute of limitations when access to the discovery material is necessary to prove factual innocence by inspecting, photocopying, and reviewing over all original criminal case discovery material requested via the FOIA?

Whether the Defendants'-Appellees' could have been compelled by the district court to reasonably ask for the N.C. SBI case file concerning Brian David Hill record and the confession audio disc of Brian David Hill from the law enforcement agencies that gave them the original records even in the event that they were destroyed by the EOUSA or the U.S. Attorney Office as it is such evidence that was originally used in the prosecution of Brian David Hill seeking to prove actual innocence?

Are the SBI case file and the confession audio disc not subject to the FOIA request since the agency has reasonable access and the authority to access such records and proof was given to the district court that the agency did have those records subject to the FOIA prior to the claim that they may be destroyed, that the federal agency does still have possession or has reasonable access to the very records that they originally had in their possession when used to prosecute Appellant and thus should be subject to FOIA as an agency record since they likely transferred the improperly withheld records but still have reasonable access to such records?

ISSUE 1

Was it contrary to Constitutional law by the district court to GRANT the Government's Motion for Summary Judgment (JA 1, Doc #48) on the ground that Constitutional rights that normally apply to a criminal defendant doesn't apply to the FOIA Requester that is the party to that criminal case?

- A) Did the district court error and fail to properly apply the evidence and Declarations/Affidavits to the district court's claim that Brady and Giglio which regard Constitutional rights doesn't apply to a criminal defendant filing a FOIA lawsuit?
- B) Did the district court error when stating that Constitutional law doesn't apply to any situation under the Freedom of Information Act (FOIA) and that only the statute applies for a FOIA Request?

The district court stated in its Memorandum Opinion that "*Plaintiff's rights under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), are and should be protected. But they have no applicability here. FOIA is a*

statutory creation and, for that reason, Plaintiff is only entitled to the rights embodied in the statute. Brady and Giglio concern the Constitutional rights of criminal defendants and have no applicability to civil litigants.” However the access to the criminal case discovery material is necessary to prove actual innocence that provides a gateway exception to the one (1) year statute of limitations requirement for the 2255 Motions.

Citing: In *Bousley v. United States*, 523 U. S. 614, 622 (1998), we held, in the context of §2255, that actual innocence may overcome a prisoner’s failure to raise a constitutional objection on direct review. Most recently, in House, we reiterated that a prisoner’s proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error. 547 U. S., at 537–538. “These decisions “see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.” *Schlup*, 513 U. S., at 324. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA’s statute of limitations.”

However it would be difficult, maybe even impossible to prove actual innocence in a collateral attack without getting access to the original criminal case discovery materials provided in the original criminal case. The Petitioner would be expected to prove actual innocence while being deprived of access to such

discovery material after conviction. The only statutory means of requesting access to the original criminal case discovery materials again is through the Freedom of Information Act (“FOIA”). Especially in a situation where the court appointed Counsel John Scott Coalter (JA 1, Docs #2-8, #12, and #4) has threatened to destroy the discovery materials and has manipulated a private lawyer from not taking the case to prevent the Appellant from proving actual innocence, so Appellant’s only means to getting access to the entire discovery material of evidence is by filing a FOIA Request and the FOIA lawsuit. By the district court denying Appellant’s Constitutional rights under Brady and Giglio to getting access to the discovery materials, this deprives the Appellant of his due process rights.

C) After the district court under the Honorable Judge Jackson Kiser ruled that “*Plaintiff’s rights under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), are and should be protected. But they have no applicability here. FOIA is a statutory creation and, for that reason, Plaintiff is only entitled to the rights embodied in the statute*”, the district court had stated that the United States Constitution doesn’t apply at all to that statute. Isn’t a Constitution above the statutory laws and framework, that in particular situations the Constitution is supposed to apply to statutes, and any laws that violate the Constitution may be null and void or that certain actions under a law may not be Constitutional depending on the circumstances of a particular case?

Well according to the entire statute of 28 U.S.C. § 2255, there is no statutory creation regarding actual innocence being a good statutory reason to vacate or set aside a sentence by a person in federal custody. The Supreme Court and Courts of Appeal have all relied on the Constitution and the intent of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) as to why actual innocence should be a gateway for permitting an untimely filed 2255 motion, even though actual innocence is not a statutory creation for such exception to the statute of limitations.

So what about FOIA? Should FOIA law or even the court compel a Government agency to again provide the criminal case discovery materials originally acquired via Brady v. Maryland, Giglio v. United States., and the Jencks Act when such material is needed to prove actual innocence prior to filing a 2255 motion to overcome the statute of limitations mandated by AEDPA? What if the court appointed defense counsel has threatened to destroy such material? What if the State Bureau of Investigation redirects a discovery material request back to the U.S. Attorney office that originally prosecuted the case? Should the Constitution apply to a FOIA request the same as the Constitution applying actual innocence exception to the statute that has no actual innocence exception codified which is why the Courts have had to interpret the exception to the statute of limitations under the Constitution.

Appellant asks the Appeals Court to make a ruling on whether the district court should allow, mandate, and require the Government under FOIA Request to provide all discovery materials of the criminal case that they originally used when they had prosecuted the criminal defendant when they can show cause that (1) the FOIA Requester is the criminal defendant that the Government had originally prosecuted and the case is not resolved, (2) the FOIA Requester has stated under Oath (Affidavit of Declaration) that such discovery materials requested via the FOIA are needed to prove factual innocence, (3) that the FOIA Requester has stated a good reason why he/she was wrongfully convicted and that such records requested via the FOIA will lead to a resolution via Writ of Habeas Corpus.

If a criminal Defendant that was wrongfully convicted and is still in federal custody is denied access to the criminal case discovery material even though requested via the FOIA and is needed to prove actual innocence, then this sets dangerous new precedent under case law that nobody has a right to prove actual innocence. The Innocence Project and other legal organizations that file Writ of Habeas Corpus petitions including 2255 motions require access to the criminal case discovery material to determine how actual innocence can be proven to override the one year statute of limitations under AEDPA. By being denied access to discovery under FOIA and if the federal prosecutor can freely deny access to discovery materials to the criminal defendant, then essentially a criminal defendant

is given no Constitutional recourse or right to prove actual innocence under the adversarial system which deprives due process protections to all criminal defendants wrongfully convicted in Federal Court.

D) The Appellant-Plaintiff has specifically proven in this case the very evidence and testimony (Declaration and/or Affidavit) without objection that (#1) he never got to review over the entire discovery evidence prior to falsely pleading guilty because his own court appointed counsel refused to give the Appellant access to the most important pages of the discovery which would have led the Appellant to fighting at the jury trial or even attempt to prove any facts of actual innocence when filing a motion for judgment of acquittal prior to the scheduled jury trial, (#2) Appellant's court appointed counsel John Scott Coalter has threatened to destroy the discovery material and that Appellant was directed to work with the U.S. Attorney or the defense counsel to get access to certain discovery material which would be necessary for Appellant to prove factual innocence, (#3) Appellant was deprived entirely of due process prior to his criminal conviction and thus he wants to prove actual innocence and the purpose of the FOIA was to try to review over and inspect and make photocopies of any or all discovery material necessary for the actual innocence defense of the Appellant which would make a very strong showing of actual innocence needed to overcome the procedural hurdles of the one year statute of limitations for criminal defendants filing 2255 Motions. Was the district court ruling in error when deciding that the Constitutional rights don't apply at all to Brian's FOIA Requests?

This issue and any other issues are mainly argued in the ARGUMENTS section of this brief.

ISSUE 2

Was it error and an abuse of discretion by the district court to threaten the Plaintiff with a criminal contempt of court charge (JA 1, Doc #59) for simply asking for a criminal investigation and prosecution into multiple lawyers of Defendants' aka the Government for criminal violation of Obstruction of Justice?

A) Did the district court abuse its discretion and err for the contempt of court threat (JA 1, Doc #59) directed to the Plaintiff of that case which coerced the Plaintiff into waiving his procedural due process right to the 'motion hearing' which of course being afraid of the district court's contempt of court was the primary reason as to waiving (JA 1, Doc #61 and Doc #61-1) his Constitutional right to the 'Motion hearing' that was scheduled for January 30, 2018?

There were still questions that had needed to be answered before the district court should consider granting a Motion for Summary Judgment. The issues of the leaked images from Anonymous (JA 1, Doc #2-5, Doc #31-3) in March, 2016 on the Internet Archive (archive.org). There was the possible dishonesty of the U.S. Attorney Office on Document #39. There was a lot that needed to be investigated and a lot of questions that needed to be asked which would warrant a hearing or multiple hearings to set all of the facts. With any evidence of dishonesty from the other side, it is difficult to just take the word of the Defendants' Counsel without an evidentiary hearing or a motion hearing. The district court had stated in the Document #59 order that "Regarding Plaintiff's First Status Report, Plaintiff is admonished that threatening the government's counsel will not be tolerated,

and his failure to comport himself appropriately before this court and in his filings can result in a charge of contempt. (See Pl.’s First Status Report ¶ 4, Nov. 27, 2017 [ECF No. 44] (“Plaintiff will ask that the next U.S. Attorney investigate and prosecute . . . Cheryl Thornton Sloan for obstruction of justice . . .”)). Judge Kiser had abused his discretion to consider simply asking for a criminal investigation to being some kind of criminal type of threat or that somehow it may be inappropriate when evidence was filed previously proving that the Appellant did not just out of the blue decide to threaten to ask for an investigation against the Defendants’ Counsel and U.S. Attorney Asst. Anand Prakash Ramaswamy. Those statements were uttered in the FOIA Appeal when filed prior to the litigation that (JA 1, Doc #2-3, Pages 7, 8 and 10) records which are secretly concealed, covered up, or destroyed without a good reason as for such may be considered an Obstruction of Justice under 18 U.S.C. § 1519. Appellant had even received a response from the Office of the Inspector General of Defendant U.S. DOJ (JA 1, Doc 14-1) refusing to investigate the allegations brought up in Appellant’s FOIA Appeal. Because of this, nobody has listened to the Appellant and has ignored his repeated calls for a criminal investigation into the U.S. Attorney Office. That was why he had stated in his “First Status Report” that he will call for the next U.S. Attorney to investigate both Assistant U.S. Attorneys Anand Prakash Ramaswamy and Cheryl Thornton Sloan for obstruction of justice because Matthew G.T. Martin is a U.S. President Trump appointee and Trump’s national campaign slogan when he ran for office of United States President was “Drain the Swamp”. So the Appellant wasn’t threatening to call for an investigation out of the blue but had repeatedly called for investigations since he discovered that certain records were concealed, covered up, or destroyed improperly by the U.S. Attorney Office regarding the SBI Case File and the Confession Audio CD disc. If the Appellant believes that the Government has

committed serious felony crimes then it is his civic right and duty under Federal law to report the crime and report it to an agency that is supposed to take action to investigate the Appellant's claims otherwise it is dereliction of duty. The Appellant did not make a criminal threat and the threat was only to investigate the truth and prosecute them for crimes if there is evidence proving that they have obstructed justice. Either the district court under Judge Jackson L. Kiser had misunderstood the intent and/or reasoning behind such claim in the "First Status Report" which may be a harmless but troublesome error as it wrongfully coerced the Appellant to waive his right to the "Motion Hearing" or it was an abuse of discretion putting the Appellant in total fear of facing a contempt of court charge and going to jail just for trying to get an investigation into the U.S. Attorney's Office which would wrongfully coerce the Appellant to waive his right to the "Motion Hearing".

The Appellant gave a good reason as to why he had stated in his First Status Report that he only wanted an investigation and understood that it would be up to the newly appointed U.S. Attorney to prosecute Anand Prakash Ramaswamy and Cheryl Thornton Sloan for Obstruction of Justice under 18 U.S.C. § 1519. He did not threaten the Government's Counsel criminally and thus should not have been harshly threatened by the district court in the matter of which it did. It sounds like an abuse of discretion and that statement coerced the Appellant to wrongfully waive his right to a "Motion Hearing" (JA 1, Doc #61, 61-1). Appellant warned the district court again that he had needed Counsel to represent him to be a buffer between him, the Defendants' Counsel, and the Court to prevent any risk of a criminal contempt of court charge which the district court erred in not requesting Counsel to represent the Appellant knowing that he may be at risk of a contempt of court charge. Citing Doc #61: "*Plaintiff had been wrongfully admonished by Judge Jackson Kiser because the Judge was warned that Plaintiff needed a lawyer to*

represent him (pursuant to 28 U.S.C. §1915(e)(1)) because of his Autism and the Judge again doesn't fully understand Plaintiff's autism and has wrongfully warned Plaintiff that he risks going to jail when he could have had a lawyer to represent him as a buffer between the Government, himself, and the Court to prevent Plaintiff from making statements that would be misconstrued as contemptuous or even threatening." The district court may have abused its discretion in repeatedly denying motions asking that the Court request Counsel to represent the Appellant for the hearings to prevent the Appellant from risking a contempt of court charge over a behavior caused by his Autism Spectrum Disorder. Even if the Court did not intend to be coercive, the statements in Doc #61 show signs of coercion or fear that led to wrongfully waiving a Constitutional right stating that "*The Plaintiff has now been put in an uncomfortable position which is causing Plaintiff and all witnesses (in support of Plaintiff) to discuss and consider not appearing before the January 30, 2018 motion hearing because of the fear and anxiety concerning the real possibility or probability of the Plaintiff being charged with contempt of court for making a verbal statement through Plaintiff's Autism Spectrum Disorder that can be misconstrued as disrespectful, contempt, or threatening... .*"

This proves that there do lay special circumstances warranting that the district Court request Counsel to represent the Appellant under 28 U.S.C. §1915(e)(1).

- B) Did the district court abuse its discretion and err for the contempt of court threat (JA 1, Doc #59) directed to the Plaintiff of that case when Plaintiff did not intend to make any threatening statements against Government Counsel when Plaintiff had repeatedly asked prior to this FOIA lawsuit that there be an investigation (JA 1, Doc #2-3, Pages 7, 8 and 10) into Assistant United

States Attorney Anand Prakash Ramaswamy for obstruction of justice (JA 1, Doc #2-2, Page 4) that was part of the record in the original complaint?

The answer to the B) question was answered below the A) question.

This issue and any other issues are mainly argued in the ARGUMENTS section of this brief.

ISSUE 3

Was it error that the district court omitted the August 29, 2016 FOIA Request from the decision that was made in the Memorandum Opinion?

The district court stated the reasoning behind the omission of the August 29, 2016 FOIA Request as to why the court didn't consider that a valid FOIA Request.

Citing Page 8, 5th footnote, Doc #63: "*Plaintiff asserts that he filed another FOIA request on August 26, 2016. (See Pl.'s Br. pg. 12.) He states he faxed it to a number "which is exactly or almost the exact same FAX number that Cheryl Thornton Sloan uses and is on the Docket Sheet in this case." (Id.) The number to which Plaintiff sent the August FOIA request is, in fact, similar (but not identical) to the number for the Assistant U.S. Attorney listed on the docket sheet in this case. Faxing a purported FOIA request to a number similar to the agency's number, however, is insufficient to show that a valid FOIA request was made. By way of example, this Court's phone number is one number different from a local home improvement store. Submitting something to the "Lawn and Garden" section would hardly qualify as proper service on this Court.*" The district court erred by

failing to acknowledge that FOIA service was properly made. The FOIA Request dated on August 29, 2016, was properly filed with Defendant EOUSA and wasn't just faxed to the U.S. Attorney's office number. Normally filing FOIA Requests with the U.S. Attorney Office isn't valid and has to be transferred to the EOUSA FOI/PA office according to Document #31-1, Page 3 of 6, "*3-17.130 - Procedure for Requests Under FOIA Received by the U.S. Attorney's*". It was faxed to the same FOIA fax number (JA1, Docs #56-1 and #56-2, Government attachment, Page 2: "Faxed to: 202-252-6047") that successfully received Appellant's FOIA request dated June 25, 2016. The Transmission Tickets prove that the FOIA Request dated August 29, 2016 did successfully transmit to the same FOIA fax number, thus it was properly served to Defendant EOUSA and the district court erred by omitting the properly filed August 29, 2016 FOIA Request. It was faxed to "Recipient's FAX ID: 3363335381" (Citing: Document #2-7, Page 2 of 12), and "Recipient's FAX ID: 2022526047" (Citing: Document #2-7, Page 3 of 12), and a statement was made (JA 1, Doc #53, Page 48 of 68) that it was faxed multiple times to Defendant EOUSA at the exact same number that successfully received the first FOIA fax dated July 25, 2016, and successfully received the FOIA Request modification letter dated September 5, 2016. So they receive both of those but somehow magically didn't receive the FOIA Request dated August 29, 2016

that was faxed two times to Defendant EOUSA. The district court did clerically err on that footnote.

The district court, made a statement in his ORDER that “*An agency is entitled to summary judgment in a FOIA action if, viewing the facts in the light most favorable to the requestor, no material facts are in dispute with regard to the agency's compliance.*” *Virginia-Pilot Media Companies, LLC v. Dept. of Justice, 147 F. Supp. 3d 437, 443 (E.D. Va. 2015)* (citing *Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 358 (4th Cir. 2009)*). To prevail on its summary judgment motion, EOUSA and DOJ “must demonstrate that each responsive document has been produced or is exempt.” *Id.* (citing *Carter, Fullerton & Hayes, 601 F. Supp. 2d at 734*). ”

The district court did not address the dishonesty of the Defendants’ Counsel from the Document #39 filing titled “PLAINTIFF'S DECLARATION IN SUPPORT OF DOCUMENT #2 COMPLAINT, AND NEW EVIDENCE CONCERNING POSSIBLE DISHONESTY OF THE U.S. ATTORNEY OFFICE OF GREENSBORO, NORTH CAROLINA,” which may draw more serious questions into whether the Defendants’ through the United States Attorney Office for the Middle District of North Carolina had properly withheld or improperly withheld records within the agency that they have reasonable access to or are in the control and custody of such records. Likely for the purpose of saving money, even if the

confession audio CD disc and the N.C. SBI case file forensic report was transferred back to the investigative agencies, the Defendant EOUSA through them U.S. Attorney Office still has control and access to those records since those records were meant to be used in the federal prosecution of the Appellant. For god's sake, the hacktivist (*term defined as a hacker activist group*) group collectively known as "Anonymous" leaked images (JA 1, Doc #2-5, Attachment to Complaint, and Doc #31-3) on "3/13/2016". That would mean that the hacker group had leaked the evidence of the SBI Case File on March 13, 2016 on the Internet Archive, that it was delivered to AUSA Ramaswamy which would be approximately four (4) to five (5) months prior to Plaintiff's FOIA Requests. That is the proof the U.S. Attorney Office still has control or reasonable access to such records and the Defendants' Counsel have not made any kind of claim or argument regarding the leak from Anonymous which would show that they do not have reasonable control or access to the SBI Case File subject to the FOIA. It could have been a Government employee leaking the images to Anonymous to publish on archive.org. The images may be grainy due to it being scanned as black and white, but it clearly says "CERTIFICATE OF DELIVERY", "STATE BUREAU OF INVESTIGATION", "CASE FILE", "SBI Case File #: 2012-02146", "Brian David Hill, and that it was delivered to "AUSA A. Ramaswamy". Color photos have been burned onto a mixed Audio/DATA CD filed with the district court on

July 17, 2017 (JA 1, Doc #31, Pages 38 and 39) and documented as such under the file names doc.leak.sbi.hill.1.jpg, doc.leak.sbi.hill.2.jpg, and doc.leak.sbi.hill.3.jpg.

A “NOTICE OF FILING PAPER OR PHYSICAL MATERIALS WITH THE CLERK” was filed with the Clerk (JA 1, Doc #31-8) filing the Audio CD with the paper record documenting such media disc with the evidence images. The Anonymous leak on Doc #2-5 and Doc #31-3 also mentioned a name such as “*Spread this far and wide if you expect that ungrateful b\$#tard of a U.S. Attorney Ripley Rand to acquit Brian.*” Why would a member of the collective group known as Anonymous think leaking several images of the SBI Case File regarding the discovery material of Appellant’s criminal case believe that leaking such material will acquit the Appellant? Because it may still exist in the U.S. Attorney’s custody and/or control. With the possible dishonesty of the U.S. Attorney Office being documented, that they will do whatever they can to win their criminal cases at whatever cost, even if that means persuading the Defendant to take the guilty plea whatever the circumstances may be that lead to that.

There are disputed facts, and not all facts were addressed to being satisfied by the district court in the Memorandum Opinion.

STATEMENT OF THE CASE

Appellant-Plaintiff (“Appellant” or “Hill”) has filed this appeal to review the district court’s decision in this case. The case arises from two (2) Freedom of Information Act (“FOIA”) requests from the United States Attorney Office for the Middle District of North Carolina through the Executive Office for United States Attorneys (“EOUSA”) one of the defendants in this case. First FOIA Request (JA 1, Doc #56-1, Attachment to United States Motion for Summary Judgment) dated July 25, 2016 and modified around September 5, 2016 (JA 1, Doc #56-2, Attachment to United States Motion for Summary Judgment), had requested records concerning “*. . .any copies of email records, documents, memos, fax records, digital records, and voice messages. The records I am requesting is in reference to “Brian David Hill” and any cases or research involving “Brian David Hill” between the dates January 2012, to August 2012. Any exchanges between the U.S. Attorney and anybody between those dates*” and was faxed with the FOIA office of the EOUSA fax number which was 202-252-6047. The second FOIA Request (JA 1, Doc #2-7, Complaint attachment) dated August 29, 2016, had requested records concerning “*. . .copies of my Discovery Packet of evidence pursuant to my Federal criminal case which includes the original audio CD containing my confession to Mayodan Police on August 29, 2012, SBI forensic case file Subject/Suspect was Brian David Hill and SBI Case File # 2012-02146,*

Mayodan Police Report on suspect Brian David Hill incl. Search Warrant and Inventory dated August 28 and 29, 2012. . ." and was faxed with the FOIA office of the EOUSA fax number which was 202-252-6047 and was also faxed with the U.S. Attorney Office at their fax number of 336-333-5381.

At issue is the agency's withholding of records in its possession and under its control or at least that they have reasonable access to and control of such records as part of their original prosecution case of "United States of America v. Brian David Hill" in the Middle District of North Carolina. The records that were withheld were the North Carolina ("N.C.") State Bureau of Investigation ("SBI") forensic case file concerning the Plaintiff-Appellant, the [false] confession audio CD of Plaintiff-Appellant, and the Search Warrant that was executed on the former residence of Plaintiff-Appellant. The evidence that the agency did have control and custody of such records lies in the leaked images released by the hacktivist (*term defined as a hacker activist group*) group collectively nicknamed as "Anonymous" (JA 1, Doc #2-5, Attachment to Complaint, and Doc #31-3). The images may be grainy due to it being scanned as black and white, but it clearly says "CERTIFICATE OF DELIVERY", "STATE BUREAU OF INVESTIGATION", "CASE FILE", "SBI Case File #: 2012-02146", "Brian David Hill, and that it was delivered to "AUSA A. Ramaswamy". Color photos have been burned onto a mixed Audio/DATA CD filed with the district court on July 17, 2017 (JA 1, Doc

#31, Pages 38 and 39) and documented as such under the file names doc.leak.sbi.hill.1.jpg, doc.leak.sbi.hill.2.jpg, and doc.leak.sbi.hill.3.jpg. A "NOTICE OF FILING PAPER OR PHYSICAL MATERIALS WITH THE CLERK" was filed with the Clerk (JA 1, Doc #31-8) filing the Audio CD with the paper record documenting such media disc filed with the evidence images. Proof exists that the Assistant U.S. Attorney "Anand Prakash Ramaswamy" who had prosecuted the whole case and was mentioned by the Declaration of Carolyn Loyer (JA 1, Doc #49-10) proves the existence of such discovery records. In the Declaration of Plaintiff Brian David Hill in support of "PLAINTIFF'S BRIEF / MEMORANDUM IN OPPOSITION TO "MOTION for Summary Judgment by Executive Office for United States Attorneys, United States Department of Justice", words from a transcript was cited under Oath (JA 1, Doc #53-1, Pages 3 to 5) from the criminal case proving that Anand Prakash Ramaswamy didn't just receive the discovery material back from Assistant Federal Public Defender Eric David Placke, but Placke had acknowledged the very discovery material he was returning to Ramaswamy in open court. The transcript cited under penalty of perjury from the criminal case but on the record in this civil case, reveals that Transcript: "*MR. PLACKE: Your Honor, I received in terms of discovery in this case from the Government two CDs, one of which contained the audio recording of the interview of Mr. Hill, the other of which contained law enforcement reports in*

PDF format. I've printed those out. The reports are a Mayodan Police Department report dated August 22, 2012, and a North Carolina State Bureau of Investigation case file dated October 23, 2013.. I should just return those to the Government at this point", then "COURT: Mr. Ramaswamy, I'll note Mr. Placke is returning the material to you."

John Scott Coalter had since then held the discovery material but had threatened to destroy the discovery material evidence (JA 1, Doc #2-8, Complaint Attachment) which is threatening to spoliation of evidence and had played manipulation games (JA 1, Doc #12, Pages 4 to 11) to prevent the discovery material from being transferred from himself to Attorney Emily Gladden of Raleigh, North Carolina. Of course Mr. Coalter threatened to destroy the discovery evidence after manipulating Attorney Gladden to not take Brian's case on a cheap price rate to prove actual innocence.

In response to Plaintiff's-Appellant's FOIA Request or Requests, the Appellant had received only 68 pages released in full, 26 pages released in part, 0 pages are withheld in full. The SBI case file report and the confession Audio CD was not part of the material released by the EOUSA.

After the event of Attorney Coalter threatening to destroy the evidence, On April 25, 2017, Plaintiff-Appellant ("Hill") had filed the lawsuit under both the

“Freedom of Information Act (“FOIA”), 5 U.S.C. §552”, and the “Right to discovery packet of evidence under the 14th Amendment of the U.S. Constitution, Due Process clause (citing Brady v. Maryland, 373 U.S. 83 (1963)).” (JA 1, Doc #2).

In the case Hill had appropriately, under Affidavit, presented his case that he did not only made the FOIA request dated August 29, 2016 for his criminal case discovery packet of evidence from the U.S. Attorney Office of Greensboro, which falls under the agency jurisdiction of the U.S. Department of Justice aka the second Appellee-Defendant (“U.S. DOJ”), and the first appellee-Defendant named as the Executive Office for United States Attorneys (“EOUSA”). Defendant-Appellee EOUSA is in charge of the U.S. Attorney Offices across the United States, including the U.S. Attorney Office of Greensboro, North Carolina. Hill had correctly stated to the Court under Affidavit that he was wrongfully convicted as cause for such FOIA request, and that he was deprived entirely of due process, causing him to be limited to only one form of relief for a 28 U.S.C. §2255 Motion, and that is the ground of “actual innocence” which would normally permit a district court to exercise equitable tolling beyond the 1-year statute of limitations for filing a 2255 Motion requesting relief to vacate, set aside, or correct a sentence. Hill had presented his case in the FOIA and 14th Amendment due process lawsuit that he needs the discovery evidence via the FOIA to prove his actual innocence so

that he can be entitled to relief to be removed from the sex offender registry and be cleared of his wrongful conviction. This is all reflected in the record.

It was revealed by Hill in "III. Statement of Claim," paragraph (1.), "That they improperly withheld records which were sought from the EOUSA. Then the U.S. Attorney may have lied that 0 records were withheld in full when testimonial and evidential facts show a different story." (JA 1, Doc #2, Page 4) However Hill revealed that there were more records that Hill believes was in the EOUSA's custody under the U.S. DOJ.

Hill and three third-party witnesses named Kenneth R. Forinash, Stella Forinash, and Roberta Hill, testified under a group-Affidavit that all four had reviewed over what was released via the FOIA request by EOUSA, and concurred that records were withheld over what was originally reviewed at attorney John Scott Coalter's office. (JA 1, Doc #2-3, Pages 14 to 15).

Hill even created a video DVD disc which was also filed on record as Exhibit 6 to complaint (JA 1, Doc #2-6), which can be viewed in the Clerk's office as video evidence under #10 filing for Doc. #2. (JA 1, Doc #2-10).

Hill has provided enough evidence to the Court which shows that the filed litigation did have merit. Defendants'-Appellees' filed answers to the summons

and thus a “Pretrial Order” was entered which set the case up for a civil trial. (JA 1, Doc #9).

Hill had filed a second group-Affidavit that was signed and concurred by third party witnesses Roberta Hill, Kenneth Forinash, and Stella B. Forinash. (JA 1, Doc #12-5, pages 2 to 3, and Doc #31-3), that revealed that Hill is requesting the discovery evidence from the U.S. Attorney aka the prosecuting attorney of his criminal case because there were records that were withheld from Hill’s FOIA request. One such record, as the Affidavit says for itself, stated that from one page from the discovery revealed that “*From the analysis, this record showed that 454 files had been downloaded with the emule program between July 20, 2012, and July 28, 2013*”. The affidavit also stated on record that “*The Mayodan, NC police raided Brian's home, and they confiscated Brian's computer on August 28, 2012. How could Brian be downloading child porn when he did not have his computer for the 11 months that the discovery said that child porn or items of interest were being downloaded?*” It is quite clear to the court, that this information alone would be very damaging to the U.S. Attorney Office and would be dangerous to sustaining the wrongful criminal conviction of Brian David Hill as shown on the criminal docket sheet filed prior to the order of the district court (JA 1, Doc #27-2).

After the first interlocutory appeal had been dismissed on October 19, 2017, The Appellant filed a petition for rehearing and a notice of stay of mandate was issued

on November 6, 2017. Appellant filed a Status Report on November 27, 2017 (JA 1, Doc #44), Government filed its Status Report 3 days later (JA 1, Doc #45). Petition for rehearing was denied on November 19, 2017.

Government filed a “Motion for Summary Judgment” (JA 1, Doc #48) and an accompanying brief on December 22, 2017 (JA 1, Doc #49).

A Motion and Supporting brief was entered requesting redacting of the Appellant’s social security numbers from public docket (JA 1, Doc #52) on December 28, 2017. The Appellant filed an opposition brief to the Government’s “Motion for Summary Judgment” on January 3, 2018 (JA 1, Doc #53). Government corrected the improper filing of social security numbers without redaction in response to the district court’s order (JA 1, Doc #56) on January 4, 2018.

The district court entered an order on January 5, 2018 for continuing the bench trial of the matter and had set forth a Motion Hearing (JA 1, Doc #59). Appellant was admonished for asking for an criminal investigation of the Government’s Counsel and Anand Prakash Ramaswamy for obstruction of justice under 18 U.S.C. § 1519. The district court had also warned that Hill may face a contempt of court charge just for simply asking for an investigation into the

disappearance of evidence regarding the N.C. SBI case file and the confession

Audio CD disc which is needed to prove actual innocence.

Government filed a reply to Appellant's response (JA 1, Doc #60). Out of fear of the Appellant facing a potential contempt of court charge for any behaviors exhibited by his Autism Spectrum Disorder and Type-1 brittle diabetes, Appellant filed a notice of waiving right to the Motion Hearing and a motion requesting legal counsel to be requested to represent the Appellant if the hearing could not be canceled (JA 1, Doc #61). Motion hearing was canceled under Document #62.

The Appellees' argued in Doc #60 that they didn't have to disclose to the Appellant the N.C. SBI case file and the confession Audio CD and that certain records was properly withheld in part as to protect the privacy of law enforcement officers and others, exempt from disclosure under Exemptions (b)(6) and (b)(7)(C). They had explained in their reply that the Government does not have to release any of the past criminal case discovery materials to the Appellant, [sic] even though the Appellant has demonstrated that he was not allowed to review over the entire discovery material prior to giving a false guilty plea in criminal court.

The N.C. State Bureau of Investigation legal Counsel Angel Gray stated that the Appellant had no right to review over the SBI criminal case investigation file that was to be used against him at a public jury trial, and that the Appellant would

have to request a copy from the defense attorney in the case or the district attorney.

She stated that "*you would need to work with your trial counsel or the District Attorney's Office to obtain a copy of the SBI file in this matter*". That material was provided in evidence that was faxed to the Office of Information Policy ("OIP") in the FOIA Appeal and the letter was filed in this case (JA 1, Doc #2-2, Page 34).

The Town of Mayodan, through its Town Clerk Melissa K. Hopper and all legal matters through Town Attorney named Philip Edward Berger (JA 1, Doc #2-2, Page 18), the town had also refused to disclose a copy of the very confession that was given by Appellant in 2012 which is needed to prove factual innocence prior to filing a motion to vacate, set aside, or correct a sentence via a 2255 motion. The very important discovery evidence that the Appellant was deprived access to by the Federal Public Defender Office and defense Attorney John Scott Coalter prior to giving a false guilty plea, and the Town of Mayodan and the SBI have both refused to let the Appellant get access to the very evidence that was used against him which led to the false guilty plea. What kind of a wonderful, competent and effective Attorney refuses to go over the entire discovery evidence material with the criminal defendant they represent then persuade that very client to falsely take the guilty plea? Then to be denied access to the discovery material fully again under the FOIA.

The district court entered a memorandum opinion (JA 1, Doc #63) on February 6, 2018, and entered an order (JA 1, Doc #64) that same day granting the Government's "Motion for Summary Judgment" under Doc #48 and denying Appellant's Document #61 Motion and notice of waiving right to the Motion Hearing.

This appeal followed.

SUMMARY OF ARGUMENT

The district court is supposed to protect and defend the Constitutional rights of the American people. Statutes are not above the Constitutional law. Statutes are only valid when appropriately passed by Congress and appropriately applied under the Constitution and through our Courts and that the U.S. Supreme Court sets the case law for all lower courts. The FOIA law is subject to our U.S. Constitutional protections which should be guaranteed to criminal Defendants seeking to prove actual innocence by inspecting, making photocopies, and reviewing over criminal case discovery materials to prove actual innocence as a gateway through the mandatory one (1) year statute of limitations on all 28 U.S.C. § 2255 motions.

Denying the right to use the FOIA process to obtain the discovery material again to prove factual innocence creates a miscarriage of justice requiring a criminal defendant to prove actual innocence but not allowing any constitutional or any legal means to be able to prove actual innocence thus bars a criminal defendant from ever being allowed to prove actual innocence. Discovery material is essential to proving actual innocence.

Regardless of whether the State Bureau of Investigation case file was transferred back to the N.C. SBI and the confession audio disc being transferred back to Mayodan Police Department in North Carolina, it shouldn't be an excuse to deny a criminal Defendant the Constitutional right to the discovery material under Brady v. Maryland and Giglio v. United States, which is necessary to prove actual innocence.

The district court fails to address the fundamental principles of our Constitutional rights applying to the FOIA.

ARGUMENT

Judge Jackson L. Kiser of the U.S. district court erred because the Constitutional rights apply to criminal defendants even in civil lawsuits. The district court directs to “*pursue his Constitutional rights as a criminal defendant, he is free to do so in a direct or collateral attack on his conviction.*” However criminal defendants cannot usually file a 2255 motion after the one (1) year statute of limitations except one gateway exception which is actual innocence. So the district court is directing Appellant to a means that cannot even be filed without proving actual innocence. Actual innocence is very difficult to prove without access to the original discovery evidence materials. The purpose of the FOIA Request was not proving actual innocence in the Western District of Virginia, but was to get access to all discovery material necessary to prove actual innocence to get around the one (1) year statute of limitations period imposed on all 2255 motions. The discovery evidence requested via the FOIA is necessary to inspect, make photocopies, and review the very evidence to necessarily prove factual innocence. Denying a criminal defendant access to the discovery material prior to filing a 2255 Motion deprives every Habeas Corpus Petitioner of the ability to prove actual innocence and makes every wrongfully convicted person as stuck as chuck. It deprives the Innocence Project and other lawyers the ability to prove actual innocence. The Freedom of Information Act should be constitutionally aggressive or liberally construed in

allowing a criminal defendant to prove actual innocence. Depriving a criminal defendant of the case discovery materials necessary to prove actual innocence subjects the criminal defendant to a wrongful conviction which is a miscarriage of justice. It deprives them of due process and deprives them of any right or privilege of proving actual innocence. Without the discovery materials, how can anybody prove actual innocence up front without being allowed access to the very evidence paper records and Audio/Video disc records used against them?

Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Nelson v. Adams*, 529 U.S. 460, 120 S. Ct. 1579 (2000) (amendment of judgement to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute).

It has already been exhibited on the record that the Appellant's constitutional rights were deprived unfairly because of being forced by circumstances and poor health into a false guilty plea agreement. (JA 1, Doc #31, pages 28 to 48). Statements were made under Declaration in Doc. #31 that made statements under Oath by Plaintiff that:

“I have been denied all of my Constitutional rights in my criminal case prior to my situation where I was given the choice of taking the guilty plea agreement or face twenty years in federal prison. The U.S. Attorney and their staff don’t seem to care that I wasn’t given any of my Constitutional rights when the Court said that I was presumed innocent until proven guilty beyond reasonable doubt. I felt my rights (innocent until proven guilty) that the Federal Court said to me that I had before my criminal Jury trial was all fake, a fraud, a façade, a lie, a swindle, because I was given no rights, thanks to the U.S. Attorney Office for the Middle District of North Carolina.” (JA 1, Doc #31)

“The rights which I believe I was deprived prior to my guilty plea and final conviction includes my right to cross examine the Government’s witnesses and the right to question them in open court, my right to compulsory process clause giving me the right to file subpoenas and compel witnesses to testify in Court and/or produce evidence and records and tangible things in my defense under the adversarial system, my right to effective assistance of trial Counsel, my rights under the American with Disabilities Act (“ADA”) that the Town of Mayodan deprived me of, my right to prove my innocence to a Jury, and my right to discovery under due process. My own Assistant Federal Public Defender named Eric David Placke betrayed me, only wanted to work with the U.S. Attorney Office, wanted me to take the guilty plea, deleted email attachments that my family emailed to him as evidence, refused to bring forth any witnesses, and weren’t going to hire a independent computer forensic expert under CJA 21 voucher to help pay for the examination of my Black Toshiba Laptop Computer, Satellite C655D, at the SBI office in Greensboro.” (JA 1, Doc #31)

“Placke didn’t even fight to get the Court to pay for a psychologist or psychiatrist that has an expertise in Autism Spectrum Disorder and Obsessive Compulsive Disorder, and explain how those disorders can cause me to give false confessions and misleading statements to law enforcement. Placke didn’t even hire an Audio expert to analyze the confession Audio from the Confession “Audio CD” originally from Mayodan Police Department that likely gave a copy burned to a CD-ROM disc to the U.S. Attorney Office of Greensboro, North Carolina. Placke didn’t even check my suspicions that the audio may have been altered or botched. None of my rights and warranted suspicions were ever looked into. Placke lied to me, lied to Federal Judges, and he deceived me and my family into thinking that he worked for me.” (JA 1, Doc #31)

And the last paragraph highlighted was “I would have lost the Jury trial, so in other words I would have been guilty anyways under extreme forms of ineffective Counsel colluding with the U.S. Attorney Office to sell me down the river like a slave on the plantation, to railroad me into a wrongful conviction either by plea agreement or lose the Jury Trial. There was going to be no innocent until proven guilty, I would have no right to prove my innocence. I was even going to be under extreme Adam Walsh Act specific restrictions if I had been released on Bail/Bond where I couldn’t use a telephone to call my Pretrial Services Officer, I wouldn’t be able to make Doctors’ appointments nor even be allowed to phone call my own lawyer because my whole family would not be allowed access to a telephone either according to the Pretrial Services Officer’s desires for the Government. I would not be allowed to even use a computer, not even to write motions like this nor be allowed to gather any evidence whatsoever. I was already being treated like some kind of a serial child rapist or some kind of danger to society before the Jury Trial. I wasn’t given any Constitutional rights. It was either take the plea agreement and

be on Probation aka Supervised Release, or I face 20 years in federal prison likely in Maximum Security because I was involved in politics. The reason I filed this FOIA lawsuit was to recover my Constitutional rights that I had been deprived of, my lost fourteenth Amendment rights that the U.S. Attorney Office in Greensboro doesn't seem to care about when it is about one of their criminal case Defendants' trying to prove their innocence.” (JA 1, Doc #31)

So Appellant has demonstrated under Affidavit and by filing many Exhibits prior to the Document #63 ORDER, that Appellant only has an interest in recovering his lost due process rights to the discovery materials of the criminal case never afforded to him in his criminal case (Citing United States of America v. Brian David Hill, Docket 1:13-cr-435-1, N.C. MD, U.S. district Court, (2014)). The Appellant needs access to the discovery evidence from his criminal case in order to mount a successful actual innocence affirmative defense to file a successive 2255 Motion pursuant to 28 U.S.C. § 2255 to attack, set aside, or vacate a sentence. Not just that but if the Appellant is left with no right to prove actual innocence and no right to investigate anything at all except to just sit quiet and just serve the sentence “like a good boy!” (Sarcasm added) then he is absolutely deprived of his Constitutional rights prior to the guilty plea and deprived of his lawful DATA on his seized and forfeited computers, therefore the Plaintiff-Appellant was deprived of property and liberty, deprived of due process, deprived of equal protection under the laws as a rich criminal defendant would have had better constitutional protections, instead of being given cruel and unusual punishment with little or no means to prove actual innocence.

The Appellant has a lot more to lose and be deprived of than all ordinary felony convictions. The “Sex Offender” class charges have a lot more restrictions, penalties, loss of property including lawful computer DATA that just happened to

unfortunately be contained on a seized hard drive or flash drive of any computer, and Sex Offenders get widespread stigmatization and even go through bullying. It is worse when a particular labeled “sex offender” is ACTUALLY INNOCENT of the charges, and is one-hundred times worse when not ever allowed to prove actual innocence in any way. The Appellant has lost due process after being arrested as documented on the record in the filings, has lost his freedom, has lost his liberty, and now apparently the U.S. Attorney has taken away the Appellant’s ability to even build a case to prove actual innocence because it would embarrass the U.S. Government to force an innocent disabled man to plead guilty under threat of “20 years in prison” then deprive the innocent disabled man of any right or even privilege to prove innocence.

It used to be that each criminal defendant was treated innocent until proven guilty, and then it was guilty until you prove yourself innocent. In Brian David Hill’s case as stated in his entire FOIA and due process civil case at issue here, Appellant has been treated as guilty since being arrested, and would not be given any means nor be given any opportunity to prove actual innocence at all. Being deprived of innocence when accused of a sex crime involving a child (child pornography) is far worse than the death penalty as the emotional trauma, the bullying, the constant false accusations of “pedophile” and “child molester” when the person could have proven innocence but is being blocked by the Federal Prosecutor that is corrupt to persuade Grand Juries to indict ham sandwiches. The Appellant has a lot of liberty and property that was lost, all because somebody decided to plant child porn on the Appellant’s computer and the U.S. Attorney is arguing that under FOIA the Appellant has no right to get access to any of the original discovery material records of the criminal case that would show actual innocence or a lot of reasonable doubts. The U.S. Attorney acts like they are the moral big-brother type

authority that is always truthful when that is not the truth. They only want to convict people. That is why every criminal defendant is supposed to be entitled to Constitutional protections so that "NO innocent man is ever convicted of a crime, far outweighs the need for administrative agency secrecy."

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E. g., *ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 93 -94 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103 -104 (1963). What we said in [397 U.S. 254, 270] *Greene v. McElroy*, 360 U.S. 474, 496 -497 (1959), is particularly pertinent here: "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment." *GOLDBERG v. KELLY*, (1970) No. 62 Argued: October 13, 1969 Decided: March 23, 1970.

What the U.S. Court of Appeals should mainly decide on is to review as to whether, the Freedom of Information Act ("FOIA") can prohibit a criminal defendant from getting access to his own criminal case discovery evidence that he was supposed to have been entitled full access to once charged and indicted by a

Grand Jury? Is the FOIA such a restrictive unconstitutional process which a criminal Defendant that claims in an Affidavit or in multiple Affidavits to giving a false guilty plea due to deteriorating health and ineffective Counsel, to being actually innocent, and needing the discovery evidence AGAIN to try to prove actual innocence and show the errors and invalid nature of the original evidence (Evidence Fraud? Manufactured Evidence?) which was used to indict and eventually lead to a criminal conviction in federal court?

Giglio v. United States, 405 U.S. 150 (1972); John L. BRADY, Petitioner, v. STATE OF MARYLAND. No. 490. Argued: March 18 and 19, 1963. Decided: May 13, 1963. The American Bar Association Standards mandate the prosecutor to make the required disclosure even though not requested to do so by the defendant to disclose evidence “helpful” to the defense. Again, Brady v Maryland, 373 U.S. 83.83 S.Ct.1194, 10 L.Ed.2d 215 (1963) and Giles v Maryland, 386 U.S. 66.87 S.Ct. 793, 17 L.Ed.2d 737 (1967).

The concern of the Appellant has been established quite clear throughout the civil case, will the Appellant be permanently blocked from gathering any evidence at all to prove actual innocence? Barred from the very material under FOIA that his own ineffective counsel received but refused to review over all material with his client prior to entering a false guilty plea?

Is it wrong for the Federal Prosecutor to not give the Appellant any opportunity to sift through the entire discovery evidence and just show the errors, the impeachable claims, and set the records straight once-and-for-all that the Appellant is actually innocent of the charge possession of child pornography and almost committed suicide (JA 1, Doc #12-2) over the whole thing which is ridiculous?

Should the U.S. DOJ be ignoring the Appellant? Should the U.S. Attorney just ignore the criminal Defendant that has a good chance to prove actual innocence? Is the Freedom of Information Act (“FOIA”) supposed to be a mechanism passed by Congress to hold the governors accountable to the governed? The purpose of the Act is ““to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.”” Id. (citing Dep’t of Air Force v. Rose, 425 U.S. 352, 361 (1976)). The Appellant is scrutinizing his mandatory sex offender status because of being actually innocent. The Appellant cannot be removed from the sex offender registry unless he can overturn his conviction. Because of the one-year 2255 deadline, the only option now is actual innocence. The Appellant should be allowed access to the very discovery evidence that was originally used against the Appellant and deprive him of all of his Constitutional rights including effective assistance of Counsel not bowing down to the U.S. Attorney (See Strickland v. Washington, 466 U.S. 668 (1984)), and asking for the original discovery records requested by his defiant defense Counsel that admitted to being in conflict of interest in the records prior to the Judge’s ORDER.

Can the U.S. Attorney be allowed to legally block their criminal Defendants’ from acquiring a copy of their discovery packet of evidence that was originally requested in their criminal cases when dealing with defiant and aggressive defense lawyers appointed by the court that refuse to do anything to prove their clients’ innocence and only listen to the Government?

Why can’t the criminal defendant have a right to prove innocence when accused of a sex crime? Are suspected child pornographers treated less than human, treated like dogs that need to be fixed or put down? That needs to be monitored and apprehended at any time? What if a suspected child pornographer wants to prove his innocence to the charge and wrongful conviction?

What if a criminal defendant never had any opportunity to conduct a cross examination? What if a criminal defendant never had any opportunity to compel witnesses under the compulsory clause? **What if a criminal defendant didn't get to see his entire criminal case discovery until after being convicted by guilty plea, then bar the criminal defendant from thoroughly reviewing the evidence any further?**

14th Amendment of the United States Constitution, Bill of Rights:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The U.S. Supreme Court has stated that fair notice of what activity would be prohibited amounts to a taking of liberty concerning all activity which lays within the fair notice. See *Johnson v. United States*, 135 S.Ct. 2551 (2015) that:

Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.

Kolender v. Lawson, 461 U. S. 352, 357–358 (1983). The prohibition of vagueness in criminal statutes “is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,” and a statute that flouts it “violates the first essential of due process.” *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926).

“The Freedom of Information Act was enacted to maintain an open government and to ensure the existence of an informed citizenry ‘to check against corruption and to hold governors accountable to the governed.’”

Ethyl Corp. v. U.S. Envtl. Prot. Agency, 25 F.3d 1241, 1245 (4th Cir. 1994) (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)).

FOIA permits citizens to request information possessed by the government, 5 U.S.C. § 552(a)(4)(B) (2017), and is to be construed broadly to provide information to the public, Ethyl Corp., 25 F.3d at 1246.

When an innocent man is wrongfully convicted and consistently deprived of Constitutional rights, legal rights, and privileges under the color of law (18 U.S.C. § 242, deprivation of rights under color of law) by both the U.S. Attorney office and the Federal Public Defender, when the U.S. Attorney may be obstructing justice and committing possibly any other forms of corruption by administrative secrecy to keep an innocent man convicted of a crime, FOIA should permit the criminal defendant that is the FOIA Requester to investigate how and why he was wrongfully convicted and be permitted to prove actual innocence by getting all records under the FOIA from the U.S. Attorney Office under Defendants EOUSA and U.S. DOJ.

FOIA “requires each governmental agency to provide information to the public on request if the request ‘reasonably describes’ the record[s] sought and is made in accordance with published agency rule for making requests.” Id. at 1245; see 5 U.S.C. § 552(a)(3).

Appellant has reasonable described in his August 29, 2016 FOIA Request as to what material he had requested to be located to be able to prove his actual innocence.

FOIA exemptions should not apply to the very criminal Defendant directly involved and is requesting the discovery materials to his own criminal case.

The district court erred by ruling that the Appellant has no Constitutional right but only the rights entitled under the FOIA statute. That would create a miscarriage of justice which would set a legal precedent where a criminal defendant who wishes to prove actual innocence that needs a copy of his/her discovery material before filing post-conviction relief would be barred from access to the very discovery material needed to prove factual innocence before filing a 2255 motion beyond the one (1) year statute of limitations period requiring the need to make a colorable showing of factual innocence.

That would set new dangerous case law precedent where state prisoners under the case law of *Brady v. Maryland*, 373 U.S. 83 (1963) is to have more Constitutional rights than those serving a sentence under Federal custody. That doesn't make any sense as the U.S. Supreme Court under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) retroactively applies to all Courts regardless of whether it was state or federal. The Constitutional rights to the discovery material to have an affirmative defense (which is actual innocence) should apply regardless of whether it is state or federal. State prisoners shouldn't have more rights to discovery material than Federal prisoners. *Brady* should also apply to those serving a Federal sentence in Federal custody.

Our Constitution and protecting each persons' constitutional rights is important to the United States otherwise we become a nation where we can no longer trust criminal records when every person wasn't convicted by true guilt but only convicted by circumstances and lack of wealth.

The district court was correct that this case does not decide the merits of actual innocence, but the decision should lie on whether a criminal defendant should be entitled to his/her discovery material prior to filing post-conviction relief for the purpose of investigating the prosecution's evidence to be able to prove actual innocence.

The district court made a harmless but clerical error regarding Page 8, footnote 4 of his order, stating that "Plaintiff asserts that this conversation occurred on June 24, 2015, but the docket clearly shows that is the date the transcript at issue was docketed. The docket text confirms that the transcript at Docket No. 115 concerns a hearing which occurred on September 30, 2014." If the district court is referring to Paragraph 4, Page 13 of Appellant's brief (Pl.'s Br. in Opp. to Defs.' Mtn. for Summ. J., Ex. 1 ¶ 4.a, Jan. 3, 2018 [ECF No. 53] (hereinafter "Pl.'s Br.")), the Appellant never asserted that the conversation occurred on June 24, 2015, but that it was asserted as the filing date of the transcript as filed by the Clerk at that time.

CONCLUSION

Under normal situations in civil cases where the Freedom of Information Act exemptions would apply, the case law may not have been set regarding a criminal defendant filing a FOIA request asking for the discovery material again (outside of the court appointed counsel) and is needed to pursue a valid claim of actual innocence needed to overcome the 1 year statute of limitations of the 2255 Motion. Appellant argues that his Constitutional rights under Brady v. Maryland and Giglio v. United States to inspect, make photocopies, and review over all criminal case discovery materials should apply to Appellant in this case. The Appellant had not exhausted his filing of a 2255 Motion at the time of his FOIA Requests. When such evidence is needed to prove factual innocence to overcome the procedural hurdles of the statute of limitations for Habeas Corpus Petitioners, Brady and Giglio should still apply to Appellant regardless of his false guilty plea.

Therefore, for the foregoing reasons, this Court should reverse the decision of the District Court by either modification of the order or vacatur of the order and remand for further proceedings.

PRIOR APPEALS & REQUEST FOR ORAL ARGUMENTS

Prior appeals or related Appeals

A. Have you filed other cases in this court? Yes [X] No []

The Plaintiff-Appellant has filed other cases in this court such as:

1. **Criminal case: 1:13-cr-435-WO-1, District: 0418-2, United States Court of Appeals for the Fourth Circuit, Court of Appeals Docket #: 15-4057, United States of America v. Brian David Hill, Appeal From: United States District Court for the Middle District of North Carolina at Greensboro, Fee Status: cja, Date NOA Filed: 01/29/2015**
2. **Civil case: 4:17-cv-00027-JLK-RSB, District: 0423-4, United States Court of Appeals for the Fourth Circuit, Court of Appeals Docket #: 17-1866, Brian David Hill v. Executive Office for United States Attorneys et al, Appeal From: United States District Court for the Western District of Virginia, Fee Status: cja, Date NOA Filed: 07/25/2017**

Request for Oral Arguments

Appellant respectfully requests that this Court hear oral argument.

This appeal raises serious Constitutional issues regarding enumerated fundamental constitutional rights.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Type-VOLUME LIMIT, Typeface Requirements, and Type Style
Requirements**

Appellant hereby certifies that:

- 1. This brief complies with the type-volume limitation of Fed. Rules. App. P. 32(a)(7)(B) and 32(f) (Items excluded from Length) because this brief does not exceed 13,000 words.**

- 2. This brief complies with the typeface requirements of Fed. Rules App. P. 32(a)(5) and the type style requirements of Fed. Rules App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.**

Respectfully submitted,

Brian D. Hill

Signed

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Martinsville, VA 24112
Phone #: (276) 790-3505



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CERTIFICATE OF SERVICE

Appellant hereby certifies that on February 26, 2018, service was made by mailing the original of the foregoing

INFORMAL BRIEF OF APPELLANT Brian D. Hill

by deposit in the United States Mail, Postage prepaid under certified mail tracking no. 7015-0640-0006-0646-2540, on February 26, 2018 addressed to the Clerk of the Court in the U.S. Court of Appeals for the Fourth Circuit. Then Appellant requests that the Clerk of the Court shall have electronically filed the foregoing INFORMAL BRIEF OF APPELLANT using the CM/ECF system which will send notification of such filing to the following:

Cheryl Thornton Sloan
U.S. Attorney Office
Civil Case # 4:17-cv-00027 – Appeal case # 18-1160
101 South Edgeworth Street, 4th Floor
Greensboro, NC 27401
Email: cheryl.sloan@usdoj.gov

This is pursuant to Appellant's "In forma Pauperis" ("IFP") status, 28 U.S.C. §1915(d) that "The officers of the court shall issue and serve all process, and perform all duties in such cases..." the Clerk shall serve process via CM/ECF to serve process with all parties.

Date of signing: <u>February 26, 2018</u>	Respectfully submitted, <u>Brian D. Hill</u> Signed Brian D. Hill (Pro Se) 310 Forest Street, Apartment 2 Martinsville, VA 24112 Phone #: (276) 790-3505 U.S.W.G.O.
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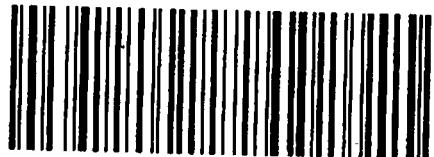
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